

EXHIBIT 1

COPY

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10-13-05

Page 1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 C.A. No. 04-11362-RWZ

4 *****

5 BARRY LINTON,
6 Plaintiff,

7 v.

8 NEW YORK LIFE INSURANCE AND
9 ANNUITY CORPORATION,
10 Defendant.

11 *****

12 DEPOSITION OF BARRY J. LINTON, a
13 witness called on behalf of the Defendant, taken
14 pursuant to the Federal Rules of Civil
15 Procedure, before Maureen O'Connor Pollard, RPR
16 and Notary Public within and for the
17 Commonwealth of Massachusetts, at the offices of
18 Ropes & Gray, One International Place, Boston,
19 Massachusetts, on the 13th of October, 2005,
20 commencing at 8:56 o'clock a.m.

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22

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24

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1 understanding or getting any of the questions
2 that are asked, let me know, we'll try to
3 clarify them for you.

4 If you want to take any breaks, let
5 your counsel know or let me know and we'll
6 accommodate you as quickly as we can.

7 It's important that you make every
8 effort to record your answer verbally with a yes
9 or a no. And there might be times when either I
10 or even, God forbid, the court reporter will
11 look over at you or even suggest that you have
12 to do something verbally; we're not doing it to
13 be testy, we're doing it to help the court
14 reporter get the record down as clearly as she
15 can.

16 How old are you, sir?

17 A. Fifty-four.

18 Q. And you're married?

19 A. Yes.

20 Q. And your wife's name is?

21 A. Joanne D. Lepke, L-E-P-K-E.

22 Q. Can you relate to me what education
23 you have starting with high school? Where did
24 you go to high school?

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1 has at the top of it the caption "Buy/Sell
2 Decisions." Do you see that?

3 A. Yes, I do.

4 Q. Okay. There's a chart there in the
5 middle of the page, it says "Demonstration of
6 Investment Strategy." Do you see that?

7 A. Yes, I do.

8 Q. Okay. Can you explain what is meant
9 to be conveyed by that chart, please?

10 A. Basically that we buy when we see a
11 mutual fund starting to go up, and we sell when
12 we see the trend -- when the trend looks like
13 it's not going to continue to go up.

14 Q. It's fair to say that you're looking
15 at short-term trends?

16 A. Yes.

17 Q. So you're looking at day to day
18 differentials between the price of portfolio
19 shares and the NAV price?

20 A. Could you repeat the question?

21 Q. You're looking at day to day
22 differentials between the value of the
23 underlying portfolio securities on the one hand
24 and the NAV on the other?

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1 particular fund in that sector would have?

2 A. Yes.

3 Q. Okay. And then the historical data
4 analysis that you were referring to a moment ago
5 that has pricing data over the past fifteen
6 years, is that analysis specific to a fund?

7 A. That is specific to the fund.

8 Q. So you're using the blending to give
9 you an estimate of what the NAV is doing that
10 day?

11 A. Correct.

12 Q. And you're, depending on which fund
13 you're in, you're looking at pricing data in
14 that fund over the past fifteen years to help
15 you do what?

16 A. To help us decide when to buy and sell
17 funds.

18 Q. And what is it about the review of the
19 historical data over the past fifteen years that
20 helps you decide whether it's time to purchase
21 or sell a fund?

22 A. Basically it's -- it looks at the
23 change in price of a fund, and it does a what if
24 scenario; if you bought the fund when it was up

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1 one percent and sold it when it was down one
2 percent, what kind of return would you get. If
3 you bought the fund when it was up a percent and
4 you sold it when it was down two percent, what
5 kind of a return would you get, and so on, and
6 you can create a matrix of numbers.

7 Q. Okay. And that matrix tells you what?

8 A. It tells us what the optimal would
9 have been for the last twelve months. You guys
10 can't use the strategy, though.

11 Q. When I understand it, I promise I
12 won't use it.

13 Is the model in some sense making
14 predictions about what will happen in the future
15 based on what's happened in the past in that
16 fund specifically, or not?

17 A. I don't know how to answer that
18 question.

19 Q. Is there any part of this buy/sell
20 decision that you make? In other words, that
21 you've got a piece of analysis over here looking
22 at the blend of securities trying to figure out
23 what the NAV is doing that day, you've got the
24 historical price data over fifteen years you're

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1 watching to see what would happen under certain
2 conditions, do the two together drive a buy/sell
3 decision?

4 A. Yes.

5 Q. Or is there any discretion involved on
6 your part to determine when it makes sense to
7 make the investment?

8 A. It's 99 percent the system.

9 Q. 99 percent the system.

10 So describe to me what's happening on
11 both sides to drive the buy decision. In other
12 words, what does the NAV need to be showing that
13 day coupled with what does the historical price
14 data need to be telling you that day to drive a
15 buy decision?

16 A. The NAV predicts the change in the
17 price. You compare that price to the maximum
18 for the last twelve months, the maximum return
19 that would have been gained, the maximum
20 combination of buy and sell signals that would
21 have produced the largest gain for the last
22 fifteen months, and if the stocks in the model
23 are predicting that it will be up sufficiently
24 according to the historical research, then you

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1 buy it or sell it as the case may be.

2 Q. What part of the analysis does this
3 chart on page PR0294 of Exhibit 1 represent?

4 A. It doesn't really represent any part
5 of the analysis, I don't believe.

6 Q. The line on the chart is showing what?

7 A. The line. Which line?

8 Q. Well, the --

9 A. The price line?

10 Q. The price line.

11 A. It's showing a mutual fund that
12 dropped in price and then went up in price and
13 then leveled out and starting to drop again.

14 Q. In a period of a week or two?

15 A. About a month. Twenty-five business
16 days.

17 Q. Fair enough.

18 And so what is the chart meant to
19 describe to a prospective investor?

20 A. How we buy, that we buy and sell
21 mutual funds based on changes in price.

22 Q. Who developed this investment
23 strategy, Mr. Linton?

24 A. No one person developed the strategy.

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1 accordance with the model that you've described
2 generally to us, are you required to make
3 investment buy/sell decisions during any
4 particular period of the day?

5 A. Yes, late in the day.

6 Q. Late in the day?

7 A. Different mutual funds would have
8 different cutoff times, different brokers would
9 have different cutoff times. But generally
10 after 2:00 o'clock in the afternoon.

11 Q. And why is that?

12 A. Because the mutual funds require us to
13 put any changes in prior to the market close.

14 Q. Is there anything about the way your
15 model is running such that your model hasn't
16 given you an answer prior to a certain time
17 during the day?

18 A. It's going to be most accurate at the
19 end of the day.

20 Q. And why is that?

21 A. Because you're trying to predict the
22 closing prices, so the closer you get to the
23 close the more accurate your price is going to
24 be.

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1 Q. It's fair to say that in making
2 buy/sell decisions your general practice was to
3 wait as late in the day as possible?

4 A. Correct.

5 Q. During the period that you were
6 investing on behalf of your clients either in
7 the limited partnership or in the individual
8 accounts, was it possible to execute trades on
9 behalf of those clients in writing?

10 A. No.

11 Q. It had to be done over the phone or
12 over the Internet?

13 A. Correct.

14 When you say was it possible, do you
15 mean could I have effected a trade?

16 Q. Not could you have effected a trade,
17 could you effected your strategy --

18 A. No.

19 Q. -- if at the end of every day you were
20 required to trade with a writing that you
21 signed?

22 A. I could think of a situation where --
23 no, no.

24 Q. The answer is no?

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1 of a single client?

2 A. No, I do not.

3 Q. Did you ever have any discussions with
4 any representative of a mutual fund or a
5 management company seeking to secure permission
6 to trade in excess of prospectus limitations?

7 A. No, no.

8 Q. No discussions like that?

9 A. No.

10 Q. When did you first meet Paul Redfearn?

11 A. I don't know. I would say it would be
12 the early nineties, but I don't know the exact
13 date.

14 Q. What were the circumstances of your
15 first meeting him?

16 A. He was an insurance salesman, and I
17 believe we were looking for life insurance for a
18 buy/sell agreement, and he was referred to us by
19 the person that we buy car insurance from,
20 Michael Linnane, L-I-N-N-A-N-E.

21 Q. Now, in this context, if you just
22 would for the record just tell me what you mean
23 by a buy/sell agreement?

24 A. If something were to happen to either

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1 A. With Mr. Redfearn.

2 Q. -- with Mr. Redfearn, but prior to
3 actually filling out the first application,
4 okay?

5 A. Yep.

6 Q. What discussions do you recall having
7 with Mr. Redfearn during that period prior to
8 March of 1999?

9 A. Well, I believe that it was probably a
10 half a year before we actually signed that first
11 policy that we started to talk to Paul, maybe a
12 year. And he brought the idea of buying a
13 variable universal life insurance policy and
14 explained how it would be a benefit to us.

15 Q. What was your reaction?

16 A. Well, I didn't want any more life
17 insurance.

18 Q. You had life insurance?

19 A. I did at the time. I was required to
20 carry it because of a divorce.

21 Q. So you didn't need insurance
22 protection, is that --

23 A. No, I did not need insurance
24 protection.

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1 Q. Well, did the possibility of
2 purchasing a variable universal life insurance
3 policy appeal to you?

4 A. It did, yes, it did.

5 Q. Why?

6 A. Because it was a way to shelter tax.

7 Q. And a way to shelter what from tax?

8 A. It was a way to shelter the gain on
9 the income from taxes.

10 Q. Okay. And what income did you think
11 that you'd be sheltering from taxes?

12 A. Investment income.

13 Q. And is it fair to say that the
14 possibility of executing trades in mutual funds
15 under a variable policy was one of the things
16 that interested you?

17 A. Absolutely.

18 Q. You considered the variable universal
19 life insurance policy an investment vehicle?

20 A. Correct.

21 Q. There came a time, didn't there, when
22 you discussed with Mr. Redfearn the possibility
23 of purchasing a variable universal life
24 insurance policy that included a gold fund? Do

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1 A. No.

2 Q. And what did you do during that period
3 prior to March of '99 on your own to examine
4 life insurance policies?

5 A. We started with a disk from Principia,
6 a CD-ROM, which is a database of VUL insurance
7 policies.

8 Q. When you say "we," this is who?

9 A. My wife and I.

10 Q. Your wife, Joanne Lepke?

11 A. Lepke.

12 Q. When were you married?

13 A. '96, '97, '97.

14 Q. We'll correct it either way.

15 A. Please.

16 Q. And where did you learn about the
17 existence of a Principia CD-ROM that would give
18 you information about VUL policies?

19 A. We used Principia for mutual funds.

20 Q. Principia is what?

21 A. It's a product by Morningstar, it's
22 basically a database of mutual funds, and they
23 also have a database of variable universal life
24 insurance policies.

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1 Q. Did the database for the VUL policies
2 provide information on the name of the policy as
3 well as the funds that were included as
4 investment opportunities under those policies?

5 A. I believe so.

6 Q. And what did you do with that database
7 information, Principia VUL database information?

8 A. We filtered it down to a list of
9 possible VULs.

10 Q. How did you do that? What was driving
11 your filter?

12 A. The type of fund they had, the
13 restrictions on trading, the availability of
14 making trades over the Internet. And there are
15 other things, but I don't remember them.

16 Q. Okay. When you say "the types of
17 funds," what types of funds were you looking
18 for?

19 A. We were looking for gold funds,
20 international funds, emerging market funds,
21 which were the best performing funds at that
22 time, and lots of funds in general.

23 Q. And you mentioned restrictions on
24 trading. What were you referring to when you

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1 said that?

2 A. We didn't -- we weren't going to get
3 engaged in any kind of a variable universal life
4 policy if there were any restrictions on
5 trading.

6 Q. What types of restrictions on trading
7 were important for you to review?

8 A. There had to be unlimited trading.

9 Q. Unlimited in the number of exchanges
10 that you could make --

11 A. Correct.

12 Q. -- between investment opportunities or
13 investment funds within a VUL?

14 A. Yes.

15 Q. And you mentioned Internet trading.
16 What was important about that?

17 A. It just made it easier at the end of
18 the day.

19 Q. When you say "Internet trading," are
20 you distinguishing between Internet trading and
21 being able to call in over an 800 line?

22 A. Yes.

23 Q. So it was important at least in the
24 first analysis to try and find policies under

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1 which you could actually sit down at your
2 computer and trade?

3 A. Yes. It wasn't that important, but it
4 was a consideration, it was one of the
5 considerations that we made. The primary
6 consideration was the restrictions on trading.
7 I'd say the second consideration was the
8 availability of funds.

9 Q. Can you recall the names of any
10 policies that you gave serious consideration to
11 prior to March of '99 other than the New York
12 Life policy?

13 A. Pacific Life strikes a bell, but I
14 don't know why. And Jefferson Pilot you've
15 mentioned, and that sounds familiar. But
16 honestly, no.

17 Q. Can you recall indicating to Mr.
18 Redfearn at some point in time that the
19 Jefferson Pilot product was no longer of
20 interest to you because the gold fund had become
21 diluted?

22 A. Had become diluted?

23 Q. Yes.

24 A. I don't.

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1 A. Correct, both the size and the number.

2 Q. How did you determine that the New
3 York Life VUL policy had in your view no
4 restriction on the number or amount of a trade?

5 A. By reading the prospectus, by reading
6 all the documents relating to the policy, and by
7 the assurance of Paul, by the representations
8 that he made at the time.

9 Q. At what time?

10 A. Prior to signing the policy.

11 Q. Prior to signing the application in
12 March?

13 A. Correct.

14 Q. So prior to your signing the first
15 application in March of 1999, Mr. Redfearn
16 specifically assured you of what?

17 A. He specifically assured us that there
18 were no restrictions on trading, and he
19 specifically assured us that the current
20 prospectus would be the prospectus that would
21 always govern that policy.

22 Q. So prior to March of 1999, prior to
23 March 12th of 1999, Mr. Redfearn specifically
24 assured you that there would be no restrictions

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1 on the number or amount of trades?

2 A. That there were not any restrictions
3 on the amount of trades. There was nothing in
4 the prospectus which limited the number or the
5 size of trades, and the prospectus was going to
6 be the governing document forever.

7 Q. Did he use the word "forever"?

8 A. For the life of the policy. I don't
9 know if he used the word "forever," I don't
10 know.

11 Q. In other words, did he tell you that
12 the prospectus that you had in front of you at
13 the time governed the policy?

14 A. Correct.

15 Q. Did he also say that it governed the
16 policy for all time?

17 A. Yes, he said it would not change. I
18 asked him that question at least four times.

19 Q. So you specifically recall asking him
20 whether or not the prospectus would change at
21 some time?

22 A. Correct.

23 Q. And he said it would not change in any
24 way?

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1 automated system. This is not speaking to an
2 operator. There's three systems that New York
3 Life has. One you can call and talk to an
4 operator, she will interrogate you, she'll ask
5 your account number, she'll ask you your Social
6 Security Number.

7 The second way was a voice, VAC, voice
8 actuated system where you could call in and you
9 didn't have to talk to an operator. To do that
10 you needed to get a PIN, personal identification
11 number. That's what I believe this document is.
12 This is a document to be able to get a PIN to be
13 able to call up so that you don't have to talk
14 to an operator and you can make exchanges in
15 your account, which we did for a while until New
16 York Life came out with the Internet where you
17 could get onto their site and make exchanges
18 directly on the site.

19 Q. When did they come out with the
20 Internet access that you started to use?

21 A. I don't know. I can guess.

22 Q. Well, just roughly.

23 A. 2000 maybe.

24 Q. So in March of 1999, did you have any

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1 whether or not the prospectus formed part of the
2 contract?

3 A. I do not.

4 Q. Do you recall having any discussion
5 with Mr. Redfearn specifically about whether the
6 prospectus was included in the materials
7 described here as consisting of the entire
8 contract?

9 A. I remember Mr. Redfearn stating that
10 the prospectus ruled the contract, that
11 everything that was written in the prospectus
12 governed the insurance contract. Yes, he said
13 that very clearly many times. He made it
14 abundantly clear.

15 Q. He made it abundantly clear that the
16 prospectus governed and applied to the contract?

17 A. Correct.

18 Q. Did he tell you that the prospectus
19 was among the materials identified here as
20 constituting the contract? Did he tell you that
21 the prospectus was the policy?

22 A. No.

23 Q. Did he tell you that the prospectus
24 was an attached rider or endorsement to the